

DOCUMENT RESUME

01997 - [A1232218]

[Request for Reimbursement of Attorney Fees Incurred for Real Estate Transactions]. E-195976. April 27, 1977. 7 pp. + enclosure (1 pf.).

Decision re: George W. Lay; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

Organization Concerned: Department of the Army.

Authority: 5 U.S.C. 5724a. 48 Comp. Gen. 469. 54 Comp. Gen. 890. 54 Comp. Gen. 1043. 54 Comp. Gen. 1042. 54 Comp. Gen. 1049. B-161891 (1967). B-163203 (1969). B-165200 (1969). B-164869 (1976). P.T.R. (FPER 101-7), para. 2-6.2c. Bureau of the Budget Circular A-56, sec. 4.2c. H. Rept. 94-667. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

A determination was requested by Colonel William E. Dyson, Executive of the Per Diem, Travel, and Transportation Allowance Committee, concerning reimbursement of an employee's attorney's fees for selling his residence. Necessary and reasonable legal fees and costs from sale of home of relocated employee are reimbursable. An overall nonitemized legal fee may be paid if within customary range of locality. This modifies previous GAO decisions, but is effective only prospectively. Claim for attorney fee for affidavit of title where no sale took place was not reimbursable. (DJH)

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William Haubert
Chf. Po's.



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-185976

DATE: April 27, 1977

**MATTER OF: George W. Lay - Real Estate Expenses -
Attorney Fees**

- DIGEST:**
1. Necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by reason of the purchase or sale of a residence incident to a permanent change of station constitute "similar expenses" within the meaning of FTR para. 2-6.2c (May 1973). Such costs may be reimbursed, provided they are within the customary range of charges for such services in the locality of the residence transaction. B-161891, August 21, 1967; 48 Comp. Gen. 469 (1969); and similar cases no longer to be followed regarding attorney fees.
 2. Since the cost of legal services normally rendered in the locality of the transaction may be reimbursed, a single overall fee charged may be paid without itemization if it is within the customary range of charges in that locality. B-163203, March 24, 1969; B-165280, December 31, 1969; and similar cases modified.
 3. This decision relating to reimbursement of legal fees incurred for real estate transactions is prospective only; it may not be applied where the settlement of the transaction occurred prior to date of decision.
 4. Because legal fees and costs associated with unsuccessful efforts to sell are analagous to statutorily unreimbursable losses due to market conditions, rule denying payment of such fees and costs, is not changed. Accordingly, claim of transferred employee for attorney's fee for preparation of affidavit of title relative to unsuccessful sales effort may not be paid.

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This action is in response to a request dated February 25, 1976, from Colonel William E. Dyson, Executive of the Per Diem, Travel, and Transportation Allowance Committee, concerning the voucher of Mr. George W. Lay, a former civilian employee of the Department of the Army, for reimbursement of certain attorney's fees incurred in selling his residence incident to a permanent change of station.

The record indicates that effective June 24, 1974, Mr. Lay was transferred from Dover, New Jersey to New Cumberland, Pennsylvania. As a result of the transfer, Mr. Lay sold his residence at the old duty station and has requested reimbursement of certain legal fees incurred in connection therewith. The claimant's employing agency did not reimburse him for the following fees charged by his attorney:

Review of contract of sale	\$50
Representation and attendance at closing	100

These items were disallowed based upon our decisions which hold that legal fees for counseling and advisory services rendered to the employee are not authorized expenses for which reimbursement is proper. In addition, \$25 was disallowed for the preparation by the attorney of an affidavit of title relative to a prior, un-consummated contract to sell the residence. This fee was not reimbursed on the grounds that the regulations do not authorize reimbursement of unusual expenses incurred by an employee because of difficulties involved in selling his residence. Whether any of the above items may properly be paid is the subject of this action.

Statutory authority for reimbursement of the expenses of residence transactions of transferred employees is found at 5 U.S.C. 5724a (1970). Regulations implementing that provision are found in para. 2-6.2c of the Federal Travel Regulations (FPMR 101-7) (May 1973) and provide as follows:

"c. Legal and related expenses. To the extent such costs have not been included in brokers' or similar services for which reimbursement is claimed under other categories, the following expenses are reimbursable with respect to the sale and purchase of residences

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if they are customarily paid by the seller of a residence at the old official station or if customarily paid by the purchaser of a residence at the new official station, to the extent they do not exceed amounts customarily charged in the locality of the residence: costs of (1) searching title, preparing abstract, and legal fees for a title opinion or (2) where customarily furnished by the seller, the cost of a title insurance policy; costs of preparing conveyances, other instruments, and contracts and related notary fees and recording fees; costs of making surveys, preparing drawings or plats when required for legal or financing purposes; and similar expenses. Costs of litigation are not reimbursable."

This paragraph carried forward, with minor changes of wording, the original provisions of section 4.2c of Bureau of the Budget Circular No. A-56 (October 12, 1966) which first provided for the reimbursement of legal fees incurred incident to transfers of station.

It should be noted at the outset that the only limitations placed by the above regulation upon the reimbursement of legal fees is that they not be included in another category, do not exceed the amount customarily charged in the locality of the residence, and are not for litigation. There is no broad prohibition against the payment of legal fees generally. However, in the first decision of this Office interpreting section 4.2c of Circular A-56, we were required to consider the appropriateness of reimbursing an employee for the services of an attorney in ascertaining the propriety of the terms of the contract of sales and other instruments, and examining the title papers and preparing a title opinion letter. We found those services to be advisory in nature and distinguished them from the searching of title and the preparation of the purchase contract, holding:

"Such services while stemming from prudence on the part of the employee are, in our opinion, not to be considered as normal or usual expenses incident to the purchase or sale of moderately priced residential housing and, therefore, not reimbursable expenses within the guidelines of section 4.2c, referred to above." B-161891, August 21, 1967.

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Based on this rationale, we have consistently held that an attorney fee paid by an employee for legal representation and advice in connection with the sale or purchase of a residence is not reimbursable. 48 Comp. Gen. 469 (1969).

Since the time of our earlier decisions, the law, regulations, and practices governing real estate transactions have grown more complex. Major Federal legislation enacted during this period affecting real estate transactions includes the Truth in Lending Act, Public Law 90-321, May 28, 1968, and the Real Estate Settlement Procedures Act of 1974, Public Law 93-533, December 22, 1974. When the latter Act was amended by Public Law 94-205 on January 2, 1976, House Report 94-667 (1975) acknowledged the complexity of real estate transactions at pages 1 - 2:

"Real estate settlement practices are different in each of the 50 states and each state differs extensively within the numerous governmental subdivisions. The attempt of last year to legislate nationally with the Real Estate Settlement Procedures Act on the problems that had arisen with regard to real estate practices in a number of jurisdictions has proved in many areas of the country to be unworkable, overly rigid in a number of other areas, and too inflexible to be administered adequately in those jurisdictions where real estate settlement practices needed the attention of Federal regulations."

It has thus been recognized by the Congress that the nature of real estate transfer services customarily performed by the attorney, the realtor, the title insurance carrier, and the financing institution varies greatly from location to location. In addition, the definition of "practice of law" governing the functions of attorneys and other persons and entities regarding real estate transactions differs among the various jurisdictions. In view of these differences and complexities, it is not uncommon for buyers and sellers of real property to obtain the services of an attorney to provide the legal services involved in a real estate transaction. Consequently, we are of the view that obtaining necessary and reasonable legal services incident to the purchase or sale of residential housing is not merely prudent, but is customary.

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In addition, we have observed from the matters referred to us for decision, that while the nature of the legal services rendered incident to a real estate transaction varies from location to location, attorneys frequently assess a single overall fee for the rendition of a combination of such services. Such a fee structure recognizes the fact that frequently some of the services provided by the attorney are a necessary continuation of other services, and that information developed by his consultations and investigations is used in its entirety to provide such services. It thus appears that in the usual case, an attorney may, incident to providing the agreed services, be required to render advice and otherwise represent the employee.

We have, therefore, reconsidered the position taken in B-161891, supra, and 48 Comp. Gen. 469, supra, and similar cases, and have determined that those cases will no longer be followed. As noted above, FTR para. 2-6.2c (May 1973) provides for reimbursement of several stated categories of legal expenses and of "similar expenses." In view of the circumstances described above, we hold that necessary and reasonable legal fees and costs customarily charged incident to the purchase or sale of a residence in the locality of the transaction, except fees and costs of litigation constitute "similar expenses" within the meaning of the regulations.

In this connection, we noted above that while the nature of the legal services rendered varies from location to location, attorneys frequently assess a single overall fee for the rendition of a combination of such services incident to a real estate transaction. We have previously required itemization of legal fees on the grounds that a listing of the services provided and the charges therefor was necessary to ensure that reimbursement be authorized only for certain enumerated services. B-163203, March 24, 1969; B-165280, December 31, 1969. Because our decision of today authorizes reimbursement of the cost of legal services customarily rendered in the locality of the residence transaction, a single fee charged therefor may properly be paid without itemization if it is within the customary range of charges for such services in that locality. Accordingly, B-163203 and B-165280, supra, are modified to the extent set forth above.

With respect to determining the amount customarily charged in a given locality, local mandatory minimum fee schedules formerly constituted the normal standard for that amount. Such schedules

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were held by the Supreme Court to violate the Sherman Anti-trust laws in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). However, pursuant to FTR para. 2-6.3c (May 1973), technical assistance in determining the reasonableness of an expense may be obtained from the local or area office of the Department of Housing and Urban Development serving the area in which the expense occurred. We have been informally advised that such assistance includes the reasonableness of legal fees and costs charged in connection with the purchase and sale of residences. Of course, if the claimed charges appear excessive, then pursuant to FTR para. 2-6.3b, any portion of such costs which is excessive shall not be reimbursed.

In determining whether a decision should be made effective retrospectively or prospectively, courts have weighed the several policies and interests involved. Thus, in Darrow v. Hanover Township, 58 N.J. 410, 278 A.2d 200 (1971), the Supreme Court of New Jersey, in determining that its decision abrogating the doctrine of interspousal immunity should be applied prospectively, considered the extent to which its prior decisions had been justifiably relied upon, and the extent to which retrospectivity would be disruptive of settled claims. However, the court applied the rule retrospectively as to the parties involved in the landmark decision since a purely prospective ruling would not provide an incentive to challenge outmoded common law doctrines.

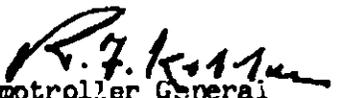
In the present matter, decisions of this Office have recently been rendered in accordance with our previous views concerning reimbursement of attorney fees. These decisions have followed an unbroken line of precedent for 10 years, and have been justifiably relied upon by transferees, by employing agencies in rendering advice to transferees, and by certifying and disbursing officers in the disposition of claims presented to them for reimbursement. Further, prospective application of our decision of today will foster stability since it will avoid the necessity of opening claims which might have gone stale because of a failure to promptly investigate. Accordingly, since this decision represents a substantial departure from our previous interpretation of the Federal Travel Regulations, and involves the overruling of many precedents on which reliance had justifiably been placed, the rules set forth above are prospective only and may not be applied where the settlement date for the transaction for which reimbursement is claimed is prior to the date of this decision. 54 Comp. Gen. 890 (1975); id. 1043 (1975).

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In the case of Mr. Lay, however, our decision of today will be applied retrospectively to his claim only. This application is in recognition of the validity of his arguments and of the fact that his claim constitutes the vehicle by which our interpretation of the Federal Travel Regulations has been altered. Accordingly, to the extent that they are necessary and reasonable in the locality of the transaction, Mr. Lay's claim for the fees charged by his attorney for review of the contract of sale and for representation at closing may be reimbursed. 54 Comp. Gen. 1042, 1049, supra.

Regarding the legal fees charged in connection with the unsuccessful previous efforts to sell the property, our rule remains unchanged. Mr. Lay's employing agency disallowed \$25 for the preparation of an affidavit of title regarding that effort. This item may not be paid because it is duplicative of costs incurred by reason of the successful sale. B-184869, September 21, 1976. Because the costs associated with uncompleted contracts are analogous to losses due to market conditions, and since reimbursement of such losses is prohibited by 5 U.S.C. 5724a(a)(4) (1970), the rule denying reimbursement of these costs is not changed. Accordingly, the claim for reimbursement of legal costs associated with unsuccessful efforts to sell a residence may not be paid. B-184869, supra.

Accordingly, the voucher may be certified for payment in accordance with the foregoing.


Deputy Comptroller General
of the United States

William Hubert
Civ. Serv.



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-185976

APR 27 1977

The Honorable Patricia R. Harris
Secretary of Housing and Urban Development

Dear Madam Secretary:

We have considered a claim by a Government employee for reimbursement of the attorney's fees incurred by him in selling his house incident to a permanent change of station. We hold by decision B-185976 of this date, copy enclosed, that the necessary and reasonable legal fees and costs customarily charged incident to the purchase or sale of a residence in the locality of the transaction, except the fees and costs of litigation, constitute "similar expenses" within the meaning of Federal Travel Regulations (FTR) (FPMR 101-7) paragraph 2-6.2c (May 1973) and may, therefore, be reimbursed.

With respect to determining the amount customarily charged for such fees in a given locality, we note that, under FTR paragraph 2-6.3c, technical assistance in determining the reasonableness of an expense may be obtained from the local or area office of the Department of Housing and Urban Development serving the area in which the expense occurred. We have been informally advised that such assistance includes the reasonableness of legal fees and costs charges incident to residence sales transaction, and we have noted this fact in our decision of today.

We would appreciate your cooperation in making our new ruling on legal expenses known to the Department's local and area offices in order that they may be prepared to render the necessary advice.

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

Enclosure

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